Supreme Court, U.S.
FILED

001585 APR - 9 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ALVIN MARKS,

Petitioner,

v.

LARRY CARMODY AND ANTHONY CINQUEGRANI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AARON B. MADUFF, ESQ.
Counsel of Record
MADUFF & MADUFF
Attorneys for Petitioner
Chicago Barr Association Building
321 S. Plymouth Court, Suite 800
Chicago, Illinois 60604
(312) 939-8877

Wright Appellate Services 0313
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

50 pp

QUESTION PRESENTED FOR REVIEW

In the context of a false arrest, a police officer who lacked probable cause is nonetheless entitled to qualified immunity if a reasonable person seeing and hearing what he did would interpret the circumstances, albeit erroneously, to warrant probable cause to arrest. An officer would also be entitled to qualified immunity if the law at issue was unsettled such that a reasonable person would believe that his own conduct did not violate the law or the constitution. An officer is not entitled to qualified immunity if his only error is to fail to know or adhere to the well settled law.

The determination of what is reasonably constitutional in the Seventh Circuit has now become at best an open question. Officers have such overbroad powers that they freely can invoke protection under qualified immunity, even though it is clear that there was no probable cause and no violation of the law. Qualified immunity must be restricted in order to protect citizens from unnecessary police harassment. This Honorable Court should grant this Writ for Certiorari in order to review the "reasonable" standard.

Whether the Lower Courts Erred in Invoking the Reasonable Person Standard and Freely Granted Qualified Immunity to Police Officer when the Facts and Applicable Case Law are Clear that the Petitioner's Perceived Conduct did not Violate any Law and the Officers Lacked Probable Cause to Arrest the Petitioner thereby Violating the Petitioner's constitutional Rights Under the Fourth and Fourteenth Amendments?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of the Basis of Jurisdiction of the Supreme Court 1

Constitutional, Statutory and Ordinance Provisions Involved in this Case 1

Statement of The Case 3

Argument 6

I. The Lower Courts Erred In Their Interpretation Of The Reasonable Person Standard And Freely Granted Qualified Immunity To Police Officers When The Facts And Applicable Law Are Clear That The Petitioner's Perceived Conduct Did Not Violate Any Law And The Officers Lacked Probable Cause To Arrest The Petitioner Thereby Violating The Petitioner's Constitutional Rights Under The Fourth And Fourteenth Amendments 6

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Alexander v. County of Los Angeles, 64 F.3d 1315 (9th Cir. 1995) 12

Anderson v. Creighton, 483 U.S. 635 (1987) 10

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986) 6

Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990) 9

City of Monterey v. DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999) 8

Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957) 6

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) 9

Finnegan v. Fountain, 915 F.2d 817, 824 n.11 (1990) 11

Frazell v. Flanagan, 102 F.3d 877, 886-87 (7th Cir. 1966) 12

Graham v. Connor, 490 U.S. 386, 397 (1989) 11

Grand Chute v. Winegar, 82 U.S. 373, 375 (1872) 9

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) 10

Hunter v. Bryant, 502 U.S. 224, 227 (1991) 10

Imbler v. Pachtman, 424 U.S. 409 (1975) 12

Jacob v. New York City, 315 U.S. 752, 752-753 (1942) 9

Jones v. Smith, 99 F.R.D. 4 (1983) 6

Kozlowski v. Ferrarra, 117 F.Supp. 650 (1954) 7

Kronmuller v. West End Fire Co. No. 3 Fire Dept., 123 F.3rd 170 (1988) 7

Landy v. Irizarry, 884 F.Supp. 788 (S.D.N.Y. 1995).....12

Markman v. Westview Instruments, Inc., 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).....8

Melo-Sonic Corporation v. Crop, 342 F.2d 856 (3rd Cir. 1965) 6

Mick v. Brewer, 76 F.3d 1127 (10th Cir. 1996) 12

Page v. Work, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961) 8

People v. Cundiff, 305 N.E.2d 735 (1979) 3

Pointer v. American Oil Co., 295 F.Supp.573 (1968).....7

Ramirez v. City of Reno, 925 F.Supp. 681, 687-89 (D.Nev. 1996) 12

Roy v. City of Lewiston, 42 F.3d 691 (1st Cir. 1994).....12

Scheuer v. Rhodes, 416 U.S. 232, 238-239 (1974) 13

Scott v. District of Columbia, 101 F.3d 748 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997).....12

Street v. Parham, 929 F.2d 537 (10th Cir. 1991).....12

Warren v. Dwyer, 906 F.2d 70, 76 (2nd Cir. 1990).....11

Wood v. Strickland, 420 U.S. 308, 320-322 (1975)..... 13

Statutes:

28 U.S.C. § 1254..... 1

42 U.S.C. § 1983..... 2, 3, 9

APPENDIX

Appendix A – Order In The United States Court of Appeals For The Seventh Circuit, dated January 9, 2001 ..... 1a

Appendix B – Order In The United States Court of Appeals For The Seventh Circuit, dated December 27, 2000 ..... 3a

Appendix C – Opinion In The United States Court of Appeals For The Seventh Circuit, decided December 12, 2000 ..... 4a

Appendix D – Judgment With Oral Argument In The United States District Court, Northern District Of Illinois, dated December 12, 2000 ..... 13a

Appendix E – Memorandum Opinion And Order of The United States District Court For The Northern District of Illinois, Eastern Division, dated March 22, 2000 ..... 15a

Appendix F – Memorandum And Order of The United States District Court For The Northern District of Illinois Eastern Division, dated January 15, 1998 ..... 25a

OPINIONS BELOW

The Decision of the Seventh Circuit Court of Appeals dated December 12, 2000, is found in the appendix on page 4a. The Decision of the Illinois District Court Northern Division dated February 14, 2000, is found in the appendix on page 15a. The Petitioner's *Petition for Rehearing With Suggestion for Rehearing En Banc,* dated December 27, 2000, and decided on January 9, 2001, is found in the appendix on page 3a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Seventh Circuit issued its Decision in this case on December 12, 2000. The Petitioner's *Petition for Rehearing En Banc* was denied on January 9, 2001. This Writ for Certiorari is timely filed within the appeal period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

Alvin Marks, the Plaintiff, (hereinafter referred to as the "Petitioner"), commenced a suit against two Wheeling, Illinois, police officers, Larry Carmody and Anthony Cinquegrani, (hereinafter referred to as the "Officers"), for violations of the Fourth and Fourteenth Amendments to the Constitution, 42 U.S.C. § 1983, one count of illegal seizure (false arrest), and one count of malicious prosecution.

The case originated on August 1, 1996, when the Officers requested that the Petitioner go to the police station for questioning involving an alleged deceitful practice of writing a bad check. During a 6 month investigation, the Officers compiled evidence from witnesses, the drawer bank, and the payee of the check. During a two hour interrogation, the Petitioner and his attorney provided the Officers with documentation concerning the check and the surrounding transactions at issue as well as photocopies of the applicable statute, headnotes from the annotated statute and the full text of a case on point, *People v. Cundiff*, 305 N.E.2d 735 (1973)1.

The Officers agreed with the Petitioner that the check had been written for a preexisting debt and there had been no

---

[1] The *Cundiff* case states that the giving of a worthless check in payment of a preexisting debt is generally held not to be within the ban of the Illinois statute prohibiting the passage of worthless checks; the court reasoned that there could be no fraud, or intent to defraud, since the party alleged to have been defrauded did not, on the strength of the check, part with anything of value, and that the acceptance of a check does not pay a debt.

contemporaneous consideration. The statute, annotations and case law which the Petitioner gave to the Officers clearly stated that the giving of a worthless check for a preexisting debt cannot be violative of the statute and there can be no intent to defraud, as required by the statute, when the issuer of the check receives no contemporaneous consideration for it. Petitioner stated that if the Officers arrested him, the latter would be promptly acquitted and then he would pursue a suit alleging constitutional violations. There was no probable cause.

Even after reviewing the admittedly conclusive evidence and statutory and case law in favor of the Petitioner, the Officers wrongfully arrested him. At the first preliminary hearing, the state's attorney filed a motion to dismiss the case, non pros.

As a result, the Petitioner filed a suit with the United States District Court Northern District of Illinois (Eastern District) alleging violations of the fourth and fourteenth amendments of the constitution, false arrest and malicious prosecution. The Officers raised qualified immunity as a defense. The Petitioners and the Officers filed Cross-Motions for Summary Judgment. On February 14, 2000, the Officers' motion was granted and the Petitioner's motion was denied; the judge stated from the bench that the Officers were protected by qualified immunity because a reasonable person might have erroneously ignored the well settled law or thought that established law enunciated in a 25 year old case might have been overturned. Such an interpretation of qualified immunity had never before been enunciated by this Court or any circuit court. The Petitioner filed a Motion for

Reconsideration and on March 22, 2000, in a written opinion, the motion was denied.

As a result, the Petitioner filed a timely notice of appeal on April 17, 2000 to the United States Court of Appeals Seventh Circuit. On December 12, 2000, the Seventh Circuit affirmed the District Court's opinion.

The Petitioner filed a *Petition for Rehearing With Suggestion for Rehearing En Banc* on December 27, 2000, which was denied on January 9, 2001.

As a result, the Petitioner requests that this Honorable Court grant this Writ for Certiorari in order to establish a uniform standard for qualified immunity among the circuits.

ARGUMENT

I. THE LOWER COURTS ERRED IN THEIR INTERPRITATION OF THE REASONABLE PERSON STANDARD AND FREELY GRANTED QUALIFIED IMMUNITY TO POLICE OFFICERS WHEN THE FACTS AND APPLICABLE LAW ARE CLEAR THAT THE PETITIONER'S PERCEIVED CONDUCT DID NOT VIOLATE ANY LAW AND THE OFFICERS LACKED PROBABLE CAUSE TO ARREST THE PETITIONER THEREBY VIOLATING THE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS.

Dismissal with prejudice of a party's complaint is a harsh sanction to be resorted to only in extreme cases, and is within the court's sound discretion; a court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); *Melo-Sonic Corporation v. Crop*, 342 F.2d 856 (3rd Cir. 1965). A summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986).

A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.* No matter how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to prove his case, and a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968). Courts may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is the plaintiff entitled to any relief for the claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Even if it is doubtful that plaintiff would ultimately prevail, if the plaintiff colorably states facts which, if proven, would entitled him relief, a motion for summary judgment should not be granted. *Kronmuller v. West End Fire Co. No. 3 Fire Dept.*, 123 F3rd 170 (1988).

The Petitioner's case should have never been disposed of upon a summary judgment motion, and in fact the Petitioner's motion on liability should have been granted. The lower courts' actions were such an abuse of discretion, because the Petitioner by way of depositions, affidavits and other competent evidence showed a substantial amount of evidence to prove his claim of liability for the Officers' unreasonable acts, lack of probable cause and complete disregard of current statutes and case law. The Petitioner's claims have merit since they were plead with particularity.

Since the summary judgment was improperly granted, the Petitioner's constitutional right to a jury trial was violated. *See Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; however, where the court declines to find a jury right under the statute, the court must reach the constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999).

Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).

In order to preserve the right to a trial by jury in constitutional violations by police officers, then the Petitioner's case must be heard by a jury in order to define what is reasonable and whether there was sufficient probable cause. Also, immunity and the deterrence of public officials violating people's constitutional rights are embedded in the statutes resulting in a right to a jury trial. 42 U.S.C. § 1983.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City,* 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ... right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment...The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson, supra,* at 255. It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.*

The Respondents has the burden to prove that a reasonable person with the factual information possessed by the Officers would have believed, even erroneously, that there was probable cause to arrest the Petitioner. If the uncontested evidence shows that a reasonable person with the factual information possessed by the Officers would not have believed there was probable cause to arrest the Petitioner, then summary judgment based on qualified immunity must have been denied. If facts material to the issue of qualified immunity are in dispute the issue of qualified immunity should have been brought before a trier of fact.

The Seventh Circuit's decision states that the test is an objective one, that is, whether a reasonable officer, knowing what they knew, would have known that the law as applied to these circumstances clearly established that an arrest would be unlawful for lack of probable cause. Qualified immunity protects arresting police officers from suit only if a reasonable officer would have believed the arrest to be lawful, in light of clearly established law and the information that the arresting officers possessed. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Government officers and officials are entitled to a defense of qualified immunity where their alleged unconstitutional conduct "does not violate clearly established...constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Honorable Court has developed and refined the defense, the primary focus is on the "objective reasonableness" of the officer's actions in the light of the legal principles that govern his conduct. *Anderson v. Creighton*, 483 U.S. 635

(1987). In *Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (1990), *citing, Warren v. Dwyer*, 906 F.2d 70, 76 (2nd Cir. 1990), the court made the following analysis:

> We made such a distinction between the reasonableness inquiries underlying a Fourth Amendment claim for an arrest without probable cause inquiry involved essentially an ex post inquiry, judging reasonableness form the "actual circumstances ... found as a matter of fact," while the qualified immunity involved and ex ante inquiry judging reasonableness "from any reasonable point of view, including even a factual misperception, the officer may reasonably have harbored at the time the events took place."

The Officers' acts were unreasonable given the facts and law admittedly known by them. There was no probable cause to arrest. If the lower courts' decisions are upheld, then Illinois, Indiana and Wisconsin officers have overbroad authority to continuously make false arrests because they know of the qualified immunity defense which is being encompassed in an absolute immunity. Since there was no basis to arrest the Petitioner, the Officers lacked probable cause and their acts would be considered unreasonable before a trier of facts. The Officers acted unreasonably therefore violating the Petitioner's fourth amendment constitutional right. *Graham v. Connor*, 490 U.S. 386, 397 (1989). The Officers' Motion for Summary Judgment should have been denied, and instead, the Petitioner's Motion for Partial Summary Judgment on the issue of liability should have been allowed. Society will frown upon the lower courts' decisions of allowing police officers to abuse their

powers and continuously make false arrests because the probable cause standard has been weakened. Immunity is not justified in the Petitioner's case since strong policy reasons suggest that the Officers lacked probable cause, acted unreasonably, and thus leading to a decision in favor of the Petitioner. The grant of immunity in this case would undermine an important purpose of 42 U.S.C. § 1983 – the deterrence of unconstitutional conduct by government officials. *Imbler v. Pachtman*, 424 U.S. 409 (1975).

A significant number of lower federal courts have held that the Fourth Amendment and the qualified immunity doctrine pose precisely the same legal issue and that any differing determinations would be legally irreconcilable. See, e.g., *Scott V. District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997); *Frazell v. Flanagan*, 102 F.3d 877, 886-87 (7th Cir. 1966) ("once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful."); *Mick v. Brewer*, 76 F.3d 1127 (10th Cir. 1996); *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995); *Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991); *Ramirez v. City of Reno*, 925 F.Supp. 681, 687-89 (D.Nev. 1996); *Landy v. Irizarry*, 884 F.Supp. 788 (S.D.N.Y. 1995). It is clear that the Officers' case lacked probable cause; however, they continued to arrest the Petitioner on grounds that were meritless since the case was not prosecuted. The Officers' acts were unreasonable since the Petitioner and his attorney provided case law and material to

the Officers refuting any allegation. But the Officers abused their authority and falsely arrested the Petitioner. Thus, the Officers violated the Petitioner's constitutional rights.

Moreover, the procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. See *Scheuer v. Rhodes*, 416 U.S. 232, 238-239 (1974); *Wood v. Strickland*, 420 U.S. 308, 320-322 (1975). "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct". *Scheuer, supra*, at 247-248. The Seventh Circuit and the District Court disregarded the two standards, abolished qualified immunity and stated that all police officers actions constitute absolute immunity. Since the law is well settled among that Circuits that the "reasonable officer" standard applies, the Seventh Circuit and District Court created a divergence to the law; the lower courts' decisions create a new outlet for qualified immunity -- that is, the officer does not need to look at the statutes and case law to undermine probable cause to arrest. Even though an officer knows the facts and is made aware of the applicable law, he/she can still arrest a person, even though there is a clear lack of probable cause, because the officer knows in the Seventh Circuit any act is reasonable and he/she would be immuned from liability. Of course, such

an interpretation is in violation of the United States Constitution.

CONCLUSION

The Seventh Circuit and the District Court of Illinois have placed a high burden of proof upon the Petitioner to overcome a motion for summary judgment in a constitutional violation case. The Court should grant *certiorari* to review this important matter, clarify the parties burden, determine that the Officers did not act reasonably given the evidence and case law to support the Petitioner's claim, reject the Officer's qualified immunity defense, and that the Officers' acts violated the Petitioner's due process rights.

Respectfully submitted,

AARON B. MADUFF, ESQ.
Counsel of Record
MADUFF & MADUFF
Attorneys for Petitioner
Chicago Barr Association Bldg.
321 S. Plymouth Ct., Ste. 800
Chicago, Illinois 60604
(312) 939-8877

APPENDIX A – ORDER IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JANUARY 9, 2001

For the Seventh Circuit
Chicago, Illinois 60604

January 9, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 00-2037

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Alvin Marks,
Plaintiff-Appellant

No. 97 C 5013

v.

Larry Carmody and Anthony Cinquegrani,
Defendants-Appellees

Matthew F. Kennelly, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed by counsel for the plaintiff-

appellant on December 27, 2000, all members of the original panel voted to **DENY** the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby **DENIED.**

APPENDIX B – ORDER IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 27, 2000

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Alvin Marks,

Plaintiff-Appellant,

v. No. 97-C-5013

Matthew F. Kennelly, *Judge*

Larry Carmody and Anthony Cinquegrani,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed by counsel for the plaintiff-appellant on December 27, 2000, all members of the original panel voted to **DENY** the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby **DENIED**.

APPENDIX C – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED DECEMBER 12, 2000

In the
United States Court of Appeals
For the Seventh Circuit

No. 00-2037

Alvin Marks,

Plaintiff-Appellant,

v.

Larry Carmody and Anthony Cinquegrani,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97-C-5013 – **Matthew Kennelly,** *Judge*

Argued November 8, 2000 – Decided December 12, 2000

Before, BAUER, RCVNER, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* On August 1, 1996, Detective Larry Carmody and Sergeant Anthony Cinquegrani,

both of the Wheeling, Illinois, Police Department, arrested Alvin Marks for issuing a bad check with intent to defraud, in violation of the Illinois Deceptive Practices Act, 720 ILCS § 5/17-1. Although the state court immediately dismissed the criminal charges against him at the first preliminary hearing, upon the state's attorney's *nolle prosequi* motion, Marks was not satisfied. Following up on a threat he had made, he sued both arresting officers under 42 U.S.C. § 1983 for false arrest. The district court concluded that the defendant officers were protected by qualified immunity from suit, and on that basis granted their motion for summary judgment. We agree that this was the proper disposition of the case, and we therefore affirm.

I.

Marks was the owner of LTD Travel Agency, Inc., located in Wheeling, and Judith Bechar owned a competing agency, Bravo Travel Services. In late 1995, Marks and Bechar decided to merge their operations. As a first step in that process, Marks incorporated a new entity, Bravo/LTD Travel. Bechar moved her operations into LTD's premises. At the same time, Marks gave up LTD's Airline Reporting Corporation (ARC) number (something a travel agency must have in order to issue tickets), and both LTD and Bravo used Bravo's ARC number.

In December of 1995, Marks purchased some personal airline tickets through Bravo/LTD, but because the formal merger had not yet taken effect, they were charged to Bechar's account for Bravo as a "house credit" transaction. Marks and his family used the tickets for a family vacation, and returned early January 1996. On Friday, January 5,

1996, Nessim Bechar (Judith's Husband), confronted Marks and demanded an immediate payment of some $1,800 for the tickets. Marks pointed out to Nessim that Bravo owed him approximately $3,000 in commissions, and he suggested an offset. Nessim refused, but (according to Marks, whose account we accept for purposes of summary judgment review) the two agreed that Marks would issue a check for the $1,800, and the next day Judith (who was unavailable, and who was the only one authorized to write checks for Bravo) would issue a check to Marks for the $3,000 in commissions. As Marks understood it, this would be accomplished mechanically by having Marks write his check to Bravo/LTD, having Judith do the same, and then having Bravo/LTD issue an $1,800 check to Judith for Bravo and a $3,000 check to Marks.

Marks accordingly gave Nessim a check for $1,800, which showed Bravo/LTD as the payee and was post-dated one day forward, to January 6, 1996. The very next day Judith pulled out the merger and refused to issue the $3,000 commission check. In the meantime, however, the Bechars had promptly attempted to cash the $1,800 check on January 5. Either because Marks's account, without the $3,000 deposit, did not have sufficient funds to cover the $1,800 check, or because Marks was upset about the termination of the merger, Marks stopped payment on the check. When Judith received the returned check, she brought civil charges against Marks seeking the $1,800 and other damages resulting from the collapse of the merger. Her civil suit was eventually dismissed without any money changing hands.

The feud between the would-be business partners did not end with civil litigation, unfortunately. In mid-February

1996, the Bechars lodged a criminal complaint with the Wheeling, Illinois, Police Department and, in support of their complaint, gave Detective Carmody the following information. The Bechars (or Bravo, which amounted to the same thing) were charged for airplane tickets that Marks bought for personal use. Marks purported to pay them for the tickets, but the check that he issued was returned for insufficient funds. (The bank later admitted that it actually meant to return the check under the stop payment order, rather than for insufficient funds. This detail is unimportant to our case, because as Detective Carmody discovered, the bank records showed that if the stop payment order had not been issued, the check would still have been returned for non-sufficient funds.) Carmody investigated the Bechars' complaint for several months. During that time, he discovered that at the time Marks wrote the check and for three days afterward, the account did not have enough funds to cover the check. Additionally, subpoenaed bank records revealed that four other checks drawn on Marks's account had been returned within the same 30-day time period. He also interviewed Marks by telephone and learned about the failed merger and the stop payment order.

On August 1, 1996, Detective Carmody contacted Marks and asked him to come to the police station for a personal interview. Marks agreed, and showed up with his lawyer. Marks and the lawyer pointed out to the detective the fact that the $1,800 check had been made payable to Bravo/LTD, not Judith Bechar or to Bravo. The lawyer showed the detective the articles of incorporation of Bravo/LTD, which revealed that Marks alone was an incorporated of the company and Judith was not. This fact, Marks argued, made it

logically impossible for him to have committed a fraud, because the only entity he would have been defrauding was one that he owned himself. The lawyer also showed Detective Carmody a 23-year-old case from the Illinois appellate court that appeared to hold that the issuance of a worthless check for a preexisting debt did not violate the statute under which Detective Carmody was proceeding, 720 ILCS § 5/17-1. See *People v. Cundiff*, 305 N.E.2d.735, 737-38 (Ill. App.Ct. 1973). Marks also gave Carmody documents related to the civil suit between himself and the Bechars (which included a claim for the disputed $1,800) and a copy of the airline tickets showing that they had been used before the check was issued. All of this meant, in the view of Mark's lawyer, that Marks did not have the intent to defraud required by the criminal statute.

Detective Carmody did not see things that way, however; he indicated instead that he was going to arrest Marks. The lawyer then threatened Carmody with a suit under 42 U.S.C. § 1983, at which point Carmody brought Sergeant Cinquegrani into the room. Marks's attorney then reviewed the entire matter for the two officers. In the end, with Sergeant Cinquegrani's approval, Detective Carmody placed Marks under arrest.

As promised, Marks followed up with the present lawsuit under § 1983. In it, he claimed that this Fourth and Fourteenth Amendment rights had been violated, his reputation had been sullied, and he had suffered pecuniary injuries. Upon the defendants' motion for summary judgment, the district court concluded that even though it was not prepared to hold that there was probable cause for the arrest, the officers were entitled to qualified immunity on this record.

II.

The question now before us is thus not whether the officers were ultimately correct when they concluded that there was probable cause to arrest Marks for a violation of the Illinois Deceptive Practices Act. It is instead the objective question whether a reasonable officer, knowing what these two knew, would have known that the law as applied to these circumstances clearly established that an arrest would be unlawful for lack of probable cause. As the district court recognized, qualified immunity protects arresting police officers from suit if a reasonable officer would have believed the arrest to be lawful, in light of clearly established law and the information that the arresting officers possessed. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). This standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law" *Id.* At 229, quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). See also *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (emphasizing the need to assess qualified immunity claims at the correct degree of particularity).

Illinois's Deceptive Practices Act makes it a crime for an individual, with intent to defraud, to issue a check, knowing that it will not be paid by the depository bank, either to pay for property, labor or services or to make a payment of an amount owed in a credit transaction. 720 ILCS § 5/17-1(B)(d) and (e). In making the decision to arrest Marks for this crime, the officers had the following information before them; Bravo (*i.e.,* Judith Bechar) had paid approximately $1,800 for airline tickets that Marks had ordered and used for his own personal use; Nessim Bechar asked Marks to pay for the tickets, and Marks responded with a check that was re-

turned unpaid; bank records show that, at the time that Marks issued the check, and for the next three days, his checking account did not contain sufficient funds to cover the check. A reasonable police officer would not have had any reason to believe that these facts were not enough to bring Marks's actions within the language of the deceptive practices statute.

The fact that Marks had alerted the officers to possible defenses he might have had to the crime does not change this result. Thus, for instance, the officers were not required to view the fact that Marks made out the check to a company that he himself had incorporated as something definitely negating the violation. Nor did they need to accept as established the evidence Marks had proffered that tended to show that he did not act with the requisite intent to defraud the Bechars. Issues of mental state and credibility are for judges and juries to decide. *Spiegel v. Cortese,* 196 F.3d 717, 725 (7th Cir. 1999); *Hebron v. Touhy,* 18 F.3d 421, 423 (7th Cir. 1994). And while we can grant for present purposes that the evidence of intent on which the officers relied would not have been sufficient for a conviction, see *People v. Bormet,* 491 N.E.2d 1281, 1284-85 (Ill. App. Ct. 1986), probable cause does not require such a high degree of certainty. *Humphrey v. Staszak,* 148 F.3d 719, 727 (7th Cir. 1998).

Marks also argues that, because the check was postdated by one day, Detective Carmody should have realized that it was in legal effect a promissory note at the time it was tendered, rather than a check. See *People v. McLaughlin,* 462 N.E.2d 875 (Ill. App. Ct. 1984). But the defendant officers did not have before them any evidence that the parties agreed that the check could be postdated, or even that Nessim Bechar noticed the one-digit discrepancy. Without such evi-

dence, it would be impossible to say that no reasonable officer could have concluded that the instrument Marks proffered was what it appeared to be – a check.

Finally, the defendants were not required to accept the assertion of Marks's attorney that the 23-year-old decision from the Third District of the Illinois Appellate Court in *People v. Cundiff* precluded a finding of probable cause. We are aware of no rule that requires police officers to accept the legal arguments offered by a suspect's attorney. Even if the officers had both read and fully understood *Cundiff* as well as a trained lawyer might, for all anyone at the police station knew, the case should have been narrowed or even overruled since it was first issued in 1973. Detective Carmody was not required to run off and run a computer search on the case's subsequent history and later interpretations of the statute from other Illinois courts before making an arrest.

In short, the officers here acted within reasonable bound when they conclude that probable cause existed for Marks's arrest, even if, with the benefit of more time for reflection, the district court was also correct to conclude that this might have been an error. Marks wrote a check to cover the cost of airline tickets that had been charged to Bravo without Judith Bechar's consent, and that check was not honored. It was probably obvious to the officers that there was some bad blood between the Bechars and Marks but the arresting officers were not required to resolve those issues. The district court's judgment dismissing the case against them on qualified immunity grounds is therefore AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D – JUDGMENT WITH ORAL ARGUMENT IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, DATED DECEMBER 12, 2000

JUDGMENT – WITH ORAL ARGUMENT

Date : December 12, 2000

BEFORE:

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 00-2037

ALVIN MARKS, individually and not in his official capacity as a City of Wheeling Police Officer,

Plaintiff-Appellant

v.

LARRY CARMODY and ANTHONY CINQUEGRANI, individually and not in their official capacity as a City of Wheeling Police Officer,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 C 5013, Matthew F. Kennelly, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX E – MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED MARCH 22, 2000

No. 97 C 5013

ALVIN MARKS,

Plaintiff,

v.

LARRY CARMODY, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

On February 14, 2000, after considering the parties written submission and hearing oral argument, the Court orally granted summary judgment in defendants' favor on the issue of qualified immunity. Plaintiff has moved for reconsideration.

Plaintiff Alvin Marks contends that he was falsely arrested and charged by defendants Larry Carmody and Anthony Cinquegrani on August 1, 1996. The undisputed facts known to the defendants at the time of the arrest, taken in the

light most favorable to the plaintiff, are as follows. On February 16, 1996, Judith and Nessim Bechar went to the Wheeling police station to make a report of deceptive practice. They spoke with Carmody, a detective with the Wheeling Police Department. The Bechars owned a travel agency called Bravo Travel. They told Carmody that Marks had purchased airline tickets costing $1,795 through Bravo's airline reporting corporation number, making Bravo responsible for payment of the tickets.

The Bechars reported that Marks had given them a check to pay for the tickets, but it had been returned for insufficient funds. They produced a copy of the check, which was made out to Bravo/LTD Travel. On its face, the check bore a stamp saying "PAYMENT STOPPED" and one saying "NOT PAID/NSF." Upon questioning, the Bechars said that in December 1995, Bravo had moved in with LTD, which was owned by Marks, as part of a planned merger, but the merger was never finalized.

On March 12, 1996, Carmody spoke with Marks, who admitted that he had bought the tickets from Bravo. He told Carmody he had stopped payment on the check because he learned that the planned merger between Bravo and LTD was not going to occur. Marks says he also told Carmody that Bechar owed him $3,000 but then had said she was not going to pay him, and that was why he had stopped payment on his check. He said that the "NSF" stamp on the check was in error.

Carmody subpoenaed Marks' bank records and obtained them on July 12, 1996. The records showed that there were insufficient funds to cover Marks' check on any of the rele-

vant dates – including the date he issued the check. The records also showed that during the same period of about 30 days, 4 other checks were returned. Carmody asked Marks to come to the police station for a further interview.

Marks appeared for an interview with his attorney Aaron Maduff on August 1, 1996. Marks explained that he had a an agreement with Bechar under which he was to issue a check to Bravo/LTD for the airplane tickets; Bravo (the Bechars' agency) was to issue a check to Bravo/LTD for commissions due to Marks; and Bravo/LTD was then to issue a check to Bravo for the airplane tickets and a check to Marks for the commissions. Marks or Maduff told Carmody that he was the sole owner of Bravo/LTD and that he since he wrote the check to Bravo/LTD, he couldn't defraud himself. Maduff also told Carmody that an Illinois decision called *People v. Cundiff*, a copy of which Maduff showed to Carmody, held that giving a worthless check in payment of a preexisting debt does not violate the deceptive practices statute. Maduff told Carmody that if he arrested Marks he would be violating Marks' civil rights and would be subjecting himself to a lawsuit.

According to Marks, Carmody brought defendant Anthony Cinquegrani, a sergeant, into the room. Marks' counsel against explained the facts of the case, and Carmody asked Cinquegrani what he should do. Cinquegrani advised him to make the arrest.

When Marks' case went to court, it was *nolle prossed* by the Assistant State's Attorney.

DISCUSSION

In moving for summary judgment, defendants argued that there was probable cause; that both defendants were entitled to qualified immunity; and the evidence established that Cinquegrani had no involvement in the arrest. In our February 14, oral ruling, we concluded that there were genuine issues of fact as to Cinquegrani's participation that precluded summary judgment on that score, and we also declined to hold that probable cause existed as a matter of law. However, we held that taking the facts in the light most favorable to plaintiff, defendants were entitled to qualified immunity.

The section of the deceptive practices statute under which Marks was charged provides that a person commits a deceptive practice (a misdemeanor) when, with intent to defraud, and with intent to obtain control over property or to pay for property, labor, or services of another, he issues a check knowing that it will not be paid by the depository. 720 ILCS 5/17-1(B)(d). The statute provides that failure to have sufficient funds with the depository when the check is issued or delivered, or when it is presented for payment and dishonored twice at least 7 days apart, is *prima facie* evidence that the offender knows the check will not be paid. *Id.* The statute defines "intent to defraud" as to act willfully with the specific intent to deceive or cheat, for the purpose of causing financial loss to another or bringing a financial gain to oneself. *Id.* 17-1(A)(iii).

Marks argues essentially that none of the statute's elements were met: the check was not issued to the Bechars or their agency, so it was not to pay for property "of another"; he had no intent to defraud because when he wrote the check

he intended that it be paid; when he stopped payment he did so not to defraud the Bechars but because they were not going to pay him a greater amount they owed to him; and that the check was returned because he stopped payment, not because there were insufficient funds. He also argues that under Illinois law, when a check is issued to pay for preexisting debt (as opposed to being issued as part of contemporaneous exchange for property), it does not constitute a deceptive practice under 17-1(B)(d).

While all of these might be winning arguments in a trial on the merits of the charge for which Marks was arrested, the issue here is not whether Marks was guilty of the charge. Indeed, the issue is not even whether there was probable cause to arrest him. Rather, the issue is whether defendants are entitled to qualified immunity. In assessing this issue, we ask whether a reasonable police officer *could* have believed (even if mistakenly) that probable cause existed; in other words, whether there was what the Seventh Circuit and other courts have referred to as "arguable probable cause."[1] *E.g., Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). *See generally Hunter v. Bryant*, 502 U.S. 224, 227 (1991). To that question the answer is yes.

Arguable probable cause existed because the elements of an offense under 17-1(B)(d) were arguably shown based on the information communicated to Carmody. First, the Be-

---

[1] This is what the Court was intending to refer to when it said in its oral ruling that "essentially if it is close enough to constituting probable cause, then qualified immunity exists." Feb. 14, 2000 Transcript at 37.

chars had told him that the check was issued to pay for airplane tickets that Marks had purchased. Though Marks provided an alternative version of the events – that the check was actually issued as part of an elaborate exchange under which he was paying for the tickets and the Bechars was paying him commissions that were due – Carmody was not required to accept Marks' version. And even if one credits Marks' story, his check was for the purpose, even if in an indirect or roundabout way, of paying for the tickets. Under 17-1(B)(d), a reasonable police officer could conclude that the check was issued "to pay for property . . . of another," as the statute requires.

Second, the documentary evidence possessed by Carmody was sufficient to permit a reasonable police officer to conclude that Marks knew that the check would not be paid at the time he issued it. Under 17-1(B)(d), "[f]ailure to have sufficient funds or credit with the depository when the check or other order issued or delivered . . . is *prima facie* evidence that the offender knows that it will not be paid by the depository." The bank records obtained by Carmody established that Marks did not have sufficient funds on deposit to cover the check either when he issued it or when he delivered it to the Bechars. This was evidence tending to establish the knowledge required by the statute, whether or not one relies on the statutory "presumption."

The same evidence regarding the state of Marks' bank account at the time he issued the check was also evidence from which a reasonable police officer could believe, even if mistakenly, that Marks had the requisite intent to defraud. Even if the statutory "presumption" is invalid, as Marks contends, evidence that Marks did not have the funds in his account to

cover the check when he wrote it, along with the fact that other checks had been returned by Marks' bank during the same time period, was at least circumstantial evidence of necessary intent.

Qualified immunity is not defeated on the basis of the other arguments Marks and Maduff presented to Carmody and Cinquegrani at the police station. Whether or not Marks was to be the sole owner of Bravo/LTD, the facts communicated to Carmody indicated, as we have stated, that the ultimate goal of Marks' check was to fund payment of the airplane tickets that he had obtained – tickets for which the Bechars' agency, not Marks and not Bravo/LTD, had gone on the hook. Marks' reason for later stopping payment likewise does not undermine qualified immunity here; intent is assessed at the timed a check is written. *People v. Bormet*, 142 Ill. App. 3d 422, 426, 491 N.E.2d 1281, 1284 (1986). At the time Marks wrote the check, he did not have sufficient funds in his account to cover it. And while the fact that a check is postdated may provide a defense in a prosecution under 17-1(B)(d) when the payee has agreed to accept such a check, *see People v. Cundiff*, 16 Ill. App. 3d 267, 270, 305 N.E.2d 735, 738 (1973), Marks never claimed that Bechars had agreed to accept a postdated check.

Marks' strongest argument is his contention that giving a bad check for a preexisting debt does not constitute a deceptive practice under §17-1(B)(d). He relies primarily on *People v. Cundiff*, the case Maduff showed and described to Carmody. *Cundiff*, a 1973 decision by the Illinois Appellate Court for the Third District, held that in such circumstances, a debtor-creditor relationship was established at the time of the original transaction; thus when the bad check is later

given to pay the debt, the creditor does not part with anything of value. According to *Cundiff*, this removes the giving of the check from the scope of what is now 17-1(B)(d). *Id.* at 269-71, 305 N.E.2d at 737-39.[2] According to Marks, *Cundiff* established as a matter of law that he had not violated the statute and, because Carmody was aware of this at the time, undermines his claim of qualified immunity.

The Court disagrees, for several reasons. First, Carmody was not required to take Maduff's word that what he was telling Carmody represented controlling and settled law. Marks' attorney was an advocate with an obligation to zealously represent his client, not a neutral observer or an attorney with an obligation to advise police officers regarding the law. We say this not to suggest that Maduff did anything misleading -- he did not – but rather simply to point out that the fact that Marks' attorney showed Carmody a decision and told him what the law was did not obligate Carmody to consider it as gospel. Second, Carmody was entitled to rely on the language of the statute, which can be fairly read as permitting a prosecution in precisely the circumstances in which *Cundiff* forbade it. Section 17-1(B)(d) provided that knowingly giving a bad check was a crime if given "with intent to obtain control over property" *or* "to pay for prop-

---

[2] Marks also cites a number of other cases that recite that one of the elements of the offense under 17-1(B)(d) is that the accused "obtained thereby" (i.e., by giving a worthless check), something of value. E.g., *People v. Balalas*, 334 Ill. 444, 166 N.E. 47 (1929). *Cundiff*, however, appears to be the only case in which the "preexisting debt" issue has ever been directly considered by an Illinois court.

erty, labor or services of another." A reasonable reading of the statute (though an incorrect one, if *Cundiff* is good law) would permit a prosecution even if the issuer of the bad check used it to *pay for* property even if he was not thereby *obtaining* property. In short, the statute's use of the disjunctive "or" can be understood as not limited the scope of the statute in the manner held by *Cundiff*. And even if Carmody understood the potential significance of *Cundiff*, it was not from a jurisdiction with controlling authority over the case that Carmody was contemplating initiating. Under the particular circumstance of this case and given the language of the statute, the law of qualified immunity did not require Carmody to conduct legal research prior to filing a misdemeanor charge against Marks to determine if *Cundiff* was controlling authority as of 1996 in the First District.[3]

Finally, even if *Cundiff* would have told a reasonable police officer that what Marks allegedly had done was not a crime under 17-1(B)(d), Carmody still had "arguable probable cause" to arrest Marks on a different charge. Section 17-1(B)(e), which was added to the statute in 1985 (after *Cundiff*), provides in substance that issuing a bad check of more that $150 "in payment of an amount owed on any credit transaction for property, labor or services" with the intent to defraud also constitutes deceptive practices. If *Cundiff* is right, and 17-1(B)(d) does not permit a prosecu-

---

[3] That said, Carmody in fact consulted his superior officer as well as an Assistant State's Attorney, Frank Catania, though we have not relied on the latter's advice in connection with this motion for reasons relating to a dispute over the scope of discovery that had not been finally resolved as of our February 14 ruling.

tion in the case of a preexisting debt because that situation involves a debtor-creditor relationship, then 17-1(B)(e) permits a prosecution in precisely that situation – a "credit transaction." Even if that was not the subsection under which Marks was charged, it is well established that for purposes of qualified immunity probable cause need not exist for the charge for which plaintiff was arrested, so long as it exists for an arrest on closely related charge. *See Biddle.v. Martin*, 992 F.2d, 673, 676 (7th Cir. 1993).

In sum, plaintiff's motion for reconsideration has not persuaded the Court that this ruling was in error. The motion for reconsideration is denied.

MATTHEW F. KENNELLY
United States District Judge

Date: March 22, 2000

APPENDIX F – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED JANUARY 15, 1998

No. 97 C 5013

ALVIN MARKS,

Plaintiff,

v.

LARRY CARMODY, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff brings a §1983 claim, based on his arrest on August 1, 1996, against Larry Carmody, a City of Wheeling police officer, his sergeant, Doe No. 1, the City of Wheeling, and three other officers, Does 2 and 4. Carmody and the City of Wheeling move to dismiss. The Doe defendants have not, apparently, ever been identified or served. Plaintiff agrees that the City of Wheeling should be dismissed, and we do so. We deny, however, Carmody's motion to dismiss.

In ruling upon the motion we look solely to the allegations of the complaint. Defendant Carmody contends that he had probable cause to arrest plaintiff or, at the least, he is entitled to qualified immunity because a reasonable trier of fact could

believe that a police officer in the circumstances could reasonably believe that he had probable cause. We cannot, however, press the concept of qualified immunity quite that far without virtually doing away with the Fourth Amendment protections, and the cases seem to go only as far as possibly requiring an independent judicial determination whether the officer had probable cause to believe he had probable case, although even that attenuation is seriously to be doubted. *See Northen v. City of Chicago*, 126 F.3d 1024, 1027 (7th Cir. 1987); *Jones v. Watson*, 106 F.3d 774, 778-79; *Mahoney v. Kesery*, 976 F2d 1054, 1057-1059 (7th Cir. 1992). In any event, we disagree that the allegations lead to the determination that Carmody had probable cause to believe he had probable cause or, obviously, that he had probable cause.

This matter began, according to the complaint, in late 1995, when plaintiff, the owner of LTD Travel Agency, Inc., entered into an arrangement with Judith Bechar, the owner of a competing travel agency, Bravo Travel Services, Inc., looking toward a merger. Plaintiff incorporated a new entity, Bravo/LTD Travel, Inc. (Bravo/LTD), and Bechar moved in. The merger, however, was never accomplished. In the meantime, plaintiff took his family to San Juan, Puerto Rico, over Christmas, on tickets that were supposed to have been charged to his credit card, but for some reason were charged to Bravo/LTD. Bechar complained on his return and plaintiff pointed out that he was owed more than the ticket amount as commissions. Bechar insisted on payment "for accounting purposes." Plaintiff paid by check to Bravo/LTD. The following day Bechar pulled out of the merger and returned to her former location. Plaintiff thought the insistence on payment was to obtain an advantage in

what promised to be a contract dispute, and he stopped payment on the check. The bank, however, returned the check as "NSF", by error, rather than as "Payment stopped." Plaintiff contacted his bank, which then provided correct documentation.

Bechar thereafter sued plaintiff and lodged with the Wheeling police a complaint about the dishonored check. About six months after the January events Carmody contacted plaintiff and advised him that he was investigating Bechar's complaint. Thereafter, on August 1, 1996, plaintiff went to the station with his attorney. He was, after some time there, arrested (the case was dismissed the first time it was up in court). Before the arrest plaintiff proffered copies of the confirmation of the stop payment, the civil suit, the airline ticket stubs showing they were used prior to the issuance of the check, and the articles of incorporation reflecting plaintiff as incorporator and owner. He explained the circumstances of the dispute and his attorney cited case law that plaintiff could not be guilty of deceptive practices under 720 ILCS 5/17-1 when the check was issued after he had used the tickets, pointed out that the check was not "NSF," and named plaintiff's own company as payee. Nevertheless, Carmody arrested plaintiff.

Defendant contends that he had probable cause and had no duty to continue to investigate once had probable cause. As an abstract principle that is correct. This would be a different case if he had arrested plaintiff after receiving the complaint and assuring himself that plaintiff had issued an "NSF" check (although the charge should have been a violation of 720 ILCS b/17(B)(e)), without further investigation. But as defendant points out, probable cause depends on the

facts and circumstance known to the officer at the time of arrest. Plaintiff may not have had a constitutional right to tell his side of the story, but he did tell it, and, if the allegations of the complaint are true, defendant Carmody then had within his knowledge facts and circumstance indicating that it was highly improbable that plaintiff was guilty of a criminal offense, irrespective of the merits of the commercial dispute between plaintiff and Bechar.

For the reasons stated, we grant the City of Wheeling's motion to dismiss and deny the motion of defendant Carmody.

_____

JAMES R. MORAN
Senior Judge, U.S. District Court

_____, 1998.